APPEAL NO. 92013

On November 27, 1991, a contested case hearing was held in (city), Texas, with (hearing officer)., presiding. The hearing officer determined that the claimant, Mr. B, the appellant in this appeal, did not sustain a compensable injury on (date of injury), in the course and scope of his employment as a deputy sheriff with Tarrant County, Texas (employer). At the time of the injury, the claimant was in the final process of cleaning his service revolver at his residence.

The claimant has asked that we review this determination, and find that the claimant sustained an injury in the course and scope of employment, and further, find that the hearing officer erred by finding that the claimant had completed the cleaning operation at the time of his injury. The carrier replies that claimant was not engaged in the furtherance of the county's business by cleaning his weapon at home, and, alternatively, that the cleaning operation had been concluded at the time of the injury.

DECISION

Finding the decision of the hearing officer to be erroneous as a matter of law, we reverse and render a decision that the claimant was injured within the course and scope of his employment. We further find that the hearing officer's conclusion that the cleaning operation had concluded at the time of the injury to be so against the great weight and preponderance of the evidence as to be manifestly unjust.

The facts are essentially undisputed. Claimant has been a jailer with the county, and was required to possess a firearm and carry it while on duty, a fact also attested to by a letter from the sheriff's department. The letter from the department further states that the claimant is required either to own his own or be prepared to assume custody of a department-issued weapon. The department states that if a jail officer uses a personal weapon while on duty, the weapon must be maintained in good working condition, thus mandating regular cleaning . . . . There is no room, area, or other place provided for the cleaning of weapons except during annual firearms qualifications . . . . Inasmuch as an officer's life or that of another may depend on the weapon, regular routine cleaning is required. It is normal for each officer to clean his/her weapon at home.

Claimant was not issued a weapon by the department, but used his own .357 magnum revolver, which he testified that he routinely cleaned at two week to one month intervals. At approximately 9:15 p.m. the night of (date of injury), the claimant unloaded his pistol at his residence and cleaned it, an operation which included the use of oil. He concluded this operation and reloaded his weapon, and left the room temporarily. When he returned, he saw oil dripping from the revolver. He picked it up and spun the cylinder to disperse the oil, and, having forgotten that he had reloaded it, pulled the trigger. He was shot in the foot. There was no evidence that he was cleaning the gun for reasons other than his understanding that the employer required the gun to be routinely cleaned, in other words, no personal motive was asserted by carrier to explain claimant's actions.

The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). The Texas Workers' Compensation Act, (1989 Act), TEX. REV. CIV. STAT. ANN. art. 8308-1.03 (12) defines course and scope of employment to include "an activity of a kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes activities conducted on the premises of the employer or at other locations . . . ." The course of employment is not necessarily limited to the exact moment when the employee reports for work nor to the moment when his or her labors for the day are completed, nor to the place where work is done if the injuries result from an activity that originates in the employment, and are received while the employee is actually engaged in furthering the employer's business. Deatherage v. International Insurance Co., 615 S.W.2d 181 (Tex. 1981). An injury has to do with, or arises out of employment, when it results from a risk or hazard which is necessary or reasonably inherent or incident to the work or business. Lumberman's Reciprocal Ass'n v. Behnken, 246 S.W.2d 72 (Tex. 1922). An injury that results from the use of one's own equipment in a manner expressly or impliedly required by the employer has been held to be within the course and scope of employment. Jones v. Texas Indemnity Insurance Co., 223 S.W.2d 286 (Tex. Civ. App.-El Paso 1949 , writ ref'd); Texas Workers' Compensation Commission Appeal No. 91111, decided January 30, 1992). *See also* American General Ins. Co. v. Williams, 227 S.W.2d 788, 791 (Tex. 1950).

The claimant complains of Conclusion of Law No. 4:

> 4.Although the activity of the cleaning of his weapon by a jailer at his residence can arguably be interpreted as having "to do with . . . the work . . . of the employer," such activity is not "performed by an employee while engaged in or about the furtherance of the affairs or business of the employer.

To the majority herein, there is nothing arguable about the fact that the requirement for cleaning a gun clearly originated with the employer, as set forth in the rather strong letter from the sheriff's department, and that the basis for such requirement directly concerned the on-the-job safety of the claimant and his coworkers. The equipment here involved, a gun, is inherently hazardous; the possessor of a firearm is exposed to risks that do not flow from possession of a uniform. All that being so, we note that the employer concedes that its own premises may not be used for the routine cleaning a gun requires, and acknowledges that its jailers clean their guns at home. In the absence of any evidence that claimant was cleaning his revolver for personal use, we believe that a finding that the operation was undertaken in furtherance of the business or affairs of the employer is compelled. The distinction made by the hearing officer in conclusion of Law No. 4 is not supported by the evidence in the case or by the law.

Although there are no reported Texas cases directly involving these facts, we would note that Pennsylvania has upheld compensability of a death incurred during an accidental shooting while an officer was cleaning his gun at home. In the case of Borough of Aldan v. Workmen's Compensation Appeal Board, 422 A.2d 733 (Commw'th. Ct. Pa. 1980), the court noted as significant to its decision many of the same factors present in the case under our consideration: that the decedent was injured while cleaning his service revolver; that the usual duties of the officer as defined by the labor agreement included the cleaning of his pistol; and that it was impracticable for officers to clean their weapon inside the police hall; and that it was their usual practice to perform this task in the home. This case was cited with approval and formed the basis for upholding compensability in the case of Montgomery County Sheriff's Department v. Workmen's Compensation Appeal Board, 556 A.2d 962 (Commw'th. Ct. Pa. 1989), involving an injury which occurred when an officer, having finished cleaning his weapon, stood up and fell back, causing the pistol to accidentally discharge. In both cases, such injuries were held to have occurred within the course and scope of employment for purposes of workers' compensation.

The case cited by carrier, Banfield v. City of San Antonio, 801 S.W.2d 134 (Tex. Civ. App.-San Antonio 1990, no writ), is clearly distinguishable. As noted even in that case, the injury resulted not from the business requirement of taking the pistol home, but from an accidental shooting through use of the revolver by the minor child of the officer. There is no such "break" in the case under consideration between the requirement of cleaning the weapon, and the activity that was underway when the injury to claimant occurred, and, in this aspect, the case under consideration is closer to Lujan v. Houston General Insurance Co., 756 S.W.2d 295 (Tex. 1988).

This leads us into the next issue disputed by claimant, and set forth in Finding of Fact No. 7, and Conclusion of Law No. 5:

7.The claimant was not injured while cleaning his weapon, having completed that process when he loaded it prior to leaving his bedroom.

5.Even if it is determined that such activity meets the statutory criteria, such would not apply in this case since the claimant had completed the cleaning process before he was injured.

In short, the hearing officer has applied a judicial scalpel to precisely carve the activity of dismantling, oiling, and reassembling the pistol from the activity of cleaning up a residual oil leak from the pistol. The evidence, as well as common sense, leads the majority herein to view the whole operation of "cleaning" the pistol as at least equal to the sum of the discreet parts of that operation, incorporating removal of residual oil from the revolver itself as a part of the overall cleaning process. It is self-evident to infer that an operation involving cleaning of a revolver necessarily includes the actions taken to free it of the excess oil used in the cleaning operation. While the claimant testified that he had "thought" he finished cleaning, it is clear that claimant's characterization of the cleaning operation as finished describes the customary concluding step of reloading his the pistol, rather than the end of doing all that

had to be done to put the gun back into working order after the immediate leak of oil occurred.

We recognize that the hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not reverse the decision, findings, and conclusions of the finder of fact, absent a determination that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). The majority herein finds that the great weight and preponderance of the evidence is against a finding that the cleanup of residual oil was accomplished after, rather than during, the cleaning operation.

In reversing the hearing officer's decision, we are doing so based upon the issues and evidence presented, including the hazardous nature of a gun, the demand that the employer made upon claimant to routinely clean the gun, the employer's acknowledgement that it did not provide on-premises facilities to carry out this
requirement, and the employer's evident expectation that the gun would be cleaned at the residences of its employees.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

DISSENTING OPINION:

While this case primarily involves an issue of law, I will recite certain facts found in this record.

Claimant is a jailer who does not have to keep a weapon with him at all times such as was required of the police officer in Banfield v. City of San Antonio, 801 S.W.2d 134 (Tex. App.-San Antonio 1990, no writ). Claimant, according to a letter from the sheriff's

department that was in evidence, was required to furnish his own weapon or to "assume custody of a County issued weapon on a daily basis as required." "Inasmuch as an officer's life or that of another may depend on the weapon, regular routine cleaning is required. It is normal for each officer to clean his/her weapon at home." There was no room to clean weapons at the jail.

While the decision of the hearing officer addressed, in part, whether the cleaning operation had been completed when the injury occurred, my opinion will consider that the injury occurred during cleaning.

Unlike the requirement of Banfield that the weapon be kept with the police officer, this case contains no evidence that claimant was told to keep his weapon with him or to personally clean it. Banfield, in keeping a weapon within reach, was available to "further the employer's business" at any time, but even that did not suffice under the test of Biggs v. U.S. Fire Ins. Co., 611 S.W.2d 624 (Tex. 1981), and Banfield was not compensated when her son shot her.

A line of cases discussed in Texas Workers' Compensation Commission Appeal No. 91111 decided January 30, 1992 dealt with matters such as the need (during non-duty hours) to replenish supplies for the employer to be used the next day or to repair a personal truck used to haul employer's equipment. The case of Liberty Mutual Ins. Co. v. Nelson, 142 Tex. 370, 178 S.W.2d 514 (1944), discussed in that Appeals Panel decision, said it could not find as a matter of law that Nelson was not acting in the course of employment when killed driving to get brushes and paint for his employer. It pointed out that Nelson was the foreman and that the work involved, painting steel, could not proceed without such supplies. The employer had acquiesced in Nelson's trips such as this in the past.

The above cases all have a thread of "furtherance of the employer's business" in the tasks undertaken and should not control the case at hand which deals with routine maintenance on the employee's property. The case of Lujan v. Houston General Ins. Co., 756 S.W.2d 295 (Tex. 1988) referred to by the majority is distinguishable since the inception of injury occurred at work in that case. The employer's requirement herein is an open-ended one to its jailers to have a clean weapon. The employer acquiesces in routine maintenance of the weapon at home but does not require that the jailer perform the cleaning. Argument at hearing compared the need to have a clean personal sidearm with the need to have a clean uniform. While routine cleaning of a weapon may be more dangerous than routine cleaning of a uniform (whether one chose to personally clean the uniform or to pay to have it done), I see no more reason to pay for injury when a person burns himself at home with an iron while routinely pressing his pants than when shot at home while routinely cleaning his pistol.

If the circumstances of this case were different and the employer asked jailers to provide a clean uniform and clean weapon for the following day's parade or because an inspection just found the uniform or pistol to be in need of cleaning now, an injury stemming therefrom could possibly be viewed as arising from an act in furtherance of the employer's

business.

To choose to personally do routine maintenance of personal equipment at home should not give rise to a compensable claim when injury results.

Joe Sebesta
Appeals Judge